

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:)

DONNA ELAINE WININGHAM, M.D.)

Case No. 800-2016-021131

Physician's and Surgeon's)

Certificate No. C 40332)

Respondent)

**DENIAL BY OPERATION OF LAW
PETITION FOR RECONSIDERATION**

No action having been taken on the petition for reconsideration, filed by Donna Elaine Winingham, M.D., and the time for action having expired at 5:00 p.m. on June 10, 2019, the petition is deemed denied by operation of law.

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:)	
)	MBC No. 800-2016-021131
DONNA ELAINE WININGHAM, M.D.)	
)	
Physician's and Surgeon's)	ORDER GRANTING STAY
Certificate No. C 40332)	
)	(Government Code Section 11521)
)	
<u>Respondent</u>)	

Respondent, Donna Elaine Winingham, M.D., has filed a Petition for Reconsideration of the Decision in this matter with an effective date of May 31, 2019, at 5:00 p.m.

Execution is stayed until June 10, 2019, at 5:00 p.m.

This stay is granted solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration.

DATED: May 29, 2019


Kimberly Kirchmeyer
Executive Director
Medical Board of California

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:)

DONNA ELAINE WININGHAM, M.D.)

**Physician's and Surgeon's)
Certificate No. C 40332)**

Respondent)

Case No. 800-2016-021131

OAH No. 2018090546


DECISION AND ORDER

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on May 31, 2019.

IT IS SO ORDERED: May 3, 2019.

MEDICAL BOARD OF CALIFORNIA



**Kristina D. Lawson, J.D., Chair
Panel B**

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

DONNA ELAINE WININGHAM, M.D.,

Physician's and Surgeon's Certificate
No. C 40332,

Respondent.

Case No. 800-2016-021131

OAH No. 2018090546

PROPOSED DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on February 5, 2019, in Los Angeles.

Nicholas B.C. Schultz, Deputy Attorney General, represented Kimberly Kirchmeyer (Complainant), Executive Director of the Medical Board of California (Board), Department of Consumer Affairs. James R. Murphy, Jr., Attorney at Law, represented Donna Elaine Winingham, M.D. (Respondent), who was present.

The record was closed and the matter was submitted for decision on February 5, 2019.

FACTUAL FINDINGS

Jurisdiction

1. Complainant filed the Accusation in her official capacity. Respondent filed a Notice of Defense. This hearing ensued.

2. The Board issued Physician's and Surgeon's Certificate No. C 40332 to Respondent on April 19, 1982. That certificate is scheduled to expire on March 31, 2020.

Respondent's Conviction

3. On May 12, 2016, in the case of *People of the State of California v. Donna Elaine Winingham* in the Superior Court of California, County of San Luis Obispo, Case No. 16M-03655, pursuant to a plea of nolo contendere, Respondent suffered a conviction of driving

a vehicle while having a blood alcohol content of approximately 0.20 percent, in violation of Vehicle Code section 23152, subdivision (b), a misdemeanor.

4. The facts and circumstances underlying the conviction occurred on March 5, 2016, beginning at 9:43 p.m., when California Highway Patrol (CHP) officers were dispatched to Templeton High School after receiving a report that an intoxicated parent had driven to the school to pick up her daughter. At hearing, Respondent testified that she rushed to the school after receiving an emergency telephone call from her daughter, who told Respondent that she was stranded there due to her other parent's failure to pick her up. Specifically, the daughter had just completed drama practice late that evening, expected her other parent to be there; her other parent was not there, which prompted the daughter to call Respondent. Respondent and the other parent had been undergoing divorce proceedings and not living in the same household. The daughter was supposed to be picked up and spend the evening with the other parent.

5. Respondent, who had consumed a substantial amount of wine prior to her daughter's telephone call, left the house in her pajamas, with no shoes, and rushed to pick up her daughter, who expressed that she was feeling frightened. The CHP officers arrived on the scene as Respondent was driving off without her daughter. The daughter had concluded that Respondent was drunk and refused to get inside of the car with Respondent. The CHP officers conducted a traffic stop of Respondent's vehicle, and observed that Respondent had all four windows of the vehicle rolled down, even though it was raining heavily at the time. They observed signs of intoxication, such as an odor of alcohol emanating from Respondent's person; red, watery, and bloodshot eyes; slurred speech; and difficulty following instructions. The officers conducted Standardized Field Sobriety Tests and noted that Respondent displayed pronounced psycho-physical impairment before she terminated the testing by requesting a breathalyzer test. Respondent consented to and provided two breath samples. The first sample revealed a blood alcohol concentration of 0.193 percent, and the second sample, produced one minute later, revealed a blood concentration of 0.198 percent. The officers immediately placed Respondent under arrest and transported her to Twin Cities Hospital for a chemical test of her blood, which revealed a blood alcohol level of 0.20 percent.

6. The court placed Respondent on three years of court-supervised probation, pursuant to terms and conditions, including serving five days in the San Luis Obispo County Jail with credit for one day served in custody. Additionally, she was required to complete a nine-month driving under the influence program for first-time offenders, ordered not to drive with any measurable amount of alcohol in her blood, and ordered to submit to chemical testing on demand of any peace or probation officers. Respondent was also ordered to obey all laws, and pay fines, fees, and assessments totaling \$2,425.

7. Respondent has paid all fines, fees, and assessments, has completed the alcohol program, and has complied with all conditions of her probation. She also completed the five days of incarceration by undergoing house arrest for those days. Respondent has committed no probation violations. Her probation is scheduled to terminate on May 12, 2019.

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Mitigation and Rehabilitation

8. Respondent expressed deep regret for making the poor choice to drive after consuming alcohol. She recognizes that she posed a danger to herself and others.

9. One month prior to her arrest, Respondent's wife had filed a petition for divorce. The divorce was devastating to Respondent as it "came from left field." Respondent and her wife had considered themselves married for 28 years, before it was officially legal in California, and had been together for nearly 30 years. Respondent used alcohol to help cope with the divorce.

10. Respondent voluntarily attended Alcoholics Anonymous meetings, even though not imposed by the court, and she also voluntarily participated in the Soberlink Program. The Soberlink Program is an alcohol monitoring breathalyzer and recovery management software system used in addiction treatment. She was required to submit to breathalyzer tests four times per day. Respondent submitted well over 500 Soberlink tests, and none of those tests revealed any positive results for drugs or alcohol.

11. Respondent also received therapy from her psychiatrist, whom she had been seeing for the last 15 years, for treatment of chronic depression. Respondent testified that she "leaned" on the psychiatrist to get through the divorce, as well as through the criminal matter.

12. Respondent, who is a board-certified radiologist, practiced nearly 40 years without incident, suffering no malpractice claims or discipline. She has reviewed approximately 1,000,000 diagnostic tests. Respondent has never consumed alcohol while practicing or reviewing scans.

13. Respondent testified at hearing that she has markedly reduced the amount of alcohol that she consumes, and currently drinks once or twice per month. During the Board's investigation interview of Respondent on September 15, 2016, Respondent stated that she consumed "a couple of glasses of wine maybe three or four times a week or less." Respondent never attempts to drive after consuming alcohol.

14. Respondent's psychiatrist, Dugald D. Chisholm, M.D., wrote a December 5, 2016 letter stating that he had been treating Respondent for Recurrent Major Depressive Disorder, and with the break-up of her marriage and resultant child custody issues, began treating her for Adjustment Disorder with Anxiety and Depression. Dr. Chisholm stated the following:

I am aware that [Respondent] has had some problems with excessive alcohol consumption in the past, but she has addressed this very seriously . . . and has diligently followed the Court's requirements . . . and has tested negative for alcohol 100% of the time.

(Exhibit B)

15. Respondent, who served in the navy for 15 years, is licensed to practice medicine in four states, currently has privileges in three hospitals, and is an assistant professor of radiology at the University of California at Irvine.

Character Reference

16. Stephen Holtzman, M.D., wrote a letter of reference on Respondent's behalf. Dr. Holtzman worked with Respondent for 15 years, and described Respondent as having good moral character.

LEGAL CONCLUSIONS

Applicable Authority

1. The Board's highest priority is to protect the public. (Bus. & Prof. Code, § 2229.)¹

2. The Board may revoke or suspend a physician's license for unprofessional conduct. (§ 2234.) Unprofessional conduct includes, among other things, (a) violating the Medical Practice Act; (b) being convicted of "any offense substantially related to the qualifications, functions, or duties of a physician and surgeon" (§ 2236, subd. (a)); (c) using any controlled substance or alcohol to an extent or in a manner dangerous to the licensee or to any other person or to the public, or a felony conviction involving the use, consumption, or self-administration of any such substance (§ 2239); and (d) violating any federal or state statute regulating dangerous drugs or controlled substances (§ 2238).

3. An offense is substantially related to the qualifications, functions, or duties of a physician or surgeon "if to a substantial degree it evidences present or potential unfitness" of a licensee to perform licensed functions "in a manner consistent with the public health, safety or welfare." (Cal. Code Regs., tit. 16, § 1360.) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed a conviction. (§§ 2236, subd. (d), 2239, subd. (b).)

Burden of Proof

4. The rigorous educational, training, and testing requirements for obtaining a physician's license justify imposing on Complainant a burden of proof of clear and convincing evidence. (Evid. Code, § 115; see *Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856; *Imports Performance v. Dept. of Consumer Affairs, Bur. of Automotive Repair* (2011) 201 Cal.App.4th 911.)

¹ Further statutory references are to the Business and Professions Code except where otherwise stated.

Cause for Discipline

5. Cause exists to discipline Respondent's license under sections 2236, subdivision (a), and 490, and California Code of Regulations, title 16, section 1360, in that Respondent suffered a conviction of driving under the influence of alcohol, in violation of Vehicle Code section 23152, subdivision (b), a misdemeanor, a crime substantially related to the qualifications, function, or duties of a physician and surgeon, as set forth in Factual Findings 3 through 7.

6. Cause exists to discipline Respondent's license under section 2239, because Respondent suffered a conviction of a misdemeanor related to the use of alcoholic beverages in a dangerous manner, as set forth in Factual Findings 3 through 7.

7. Cause exists to discipline Respondent's license under sections 2234, subdivision (a), and 2236, in that Respondent engaged in unprofessional conduct by suffering a conviction of driving under the influence of alcohol, a crime substantially related to the qualifications, function, or duties of a physician and surgeon, and Respondent used alcoholic beverages to the extent, or in such a manner, as to be dangerous and injurious to herself, or to any other person or to the public, as set forth in Factual Findings 3 through 7.

8. Respondent offered evidence of mitigation and rehabilitation. (Factual Findings 8 through 16.) She remains, however, on supervised criminal probation for three more months, and has not had sufficient time or opportunity since her conviction to establish that her continued unsupervised licensure, without probation, would not present a risk to public safety and welfare. Based on Factual Findings 3 through 16, the safety of the public can only be protected if respondent's license is placed on probation.

ORDER

Physician's and Surgeon's Certificate No. C 40332, issued to Donna Elaine Winingham, M.D., is revoked. The revocation is stayed, however, and Respondent is placed on probation for three years on the following terms and conditions.

1. Notification

Within seven (7) days of the effective date of this Decision, Respondent shall provide a true copy of this Decision and Accusation to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Board or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

2. Supervision of Physician Assistants and Advanced Practice Nurses

During probation, respondent is prohibited from supervising physician assistants and advanced practice nurses.

3. Obey All Laws

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

4. Quarterly Declarations

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

5. General Probation Requirements

Compliance with Probation Unit

Respondent shall comply with the Board's probation unit.

Address Changes

Respondent shall, at all times, keep the Board informed of respondent's business and residence addresses, email address (if available), and telephone number. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

Place of Practice

Respondent shall not engage in the practice of medicine in respondent's or patient's place of residence, unless the patient resides in a skilled nursing facility or other similar licensed facility.

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License Renewal

Respondent shall maintain a current and renewed California physician's and surgeon's license.

Travel or Residence Outside California

Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

In the event respondent should leave the State of California to reside or to practice respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

6. Interview with the Board or its Designee

Respondent shall be available in person upon request for interviews either at respondent's place of business or at the probation unit office, with or without prior notice throughout the term of probation.

7. Non-practice While on Probation

Respondent shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar days of respondent's return to practice. Non-practice is defined as any period of time respondent is not practicing medicine as defined in Business and Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. If respondent resides in California and is considered to be in non-practice, respondent shall comply with all terms and conditions of probation. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice and does not relieve respondent from complying with all the terms and conditions of probation. Practicing medicine in another state of the United States or Federal jurisdiction while on probation with the medical licensing authority of that state or jurisdiction shall not be considered non-practice. A Board-ordered suspension of practice shall not be considered as a period of non-practice.

In the event respondent's period of non-practice while on probation exceeds 18 calendar months, respondent shall successfully complete the Federation of State Medical Board's Special Purpose Examination, or, at the Board's discretion, a clinical competence assessment program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines" prior to resuming the practice of medicine.

Respondent's period of non-practice while on probation shall not exceed two (2) years.

Periods of non-practice will not apply to the reduction of the probationary term.

Periods of non-practice for a respondent residing outside of California, will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; General Probation Requirements; Quarterly Declarations; Abstain from the Use of Alcohol and/or Controlled Substances; and Biological Fluid Testing.

8. Completion of Probation

Respondent shall comply with all financial obligations (e.g., restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, respondent's certificate shall be fully restored.

9. Violation of Probation

Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

10. License Surrender

Following the effective date of this Decision, if respondent ceases practicing due to retirement or health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request to surrender her license. The Board reserves the right to evaluate respondent's request and to exercise its discretion in determining whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, respondent shall, within 15 calendar days, deliver respondent's wallet and wall certificate to the Board or its designee and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation. If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

11. Probation Monitoring Costs

Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis.

Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year.

12. Alcohol - Abstain From Use

Respondent shall abstain completely from the use of products or beverages containing alcohol.

If respondent has a confirmed positive biological fluid test for alcohol, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the Board within 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. If the case is heard by an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the Board within 15 days of submission of the matter. Within 15 days of receipt by the Board of the Administrative Law Judge's proposed decision, the Board shall issue its Decision, unless good cause can be shown for the delay. If the case is heard by the Board, the Board shall issue its decision within 15 days of submission of the case, unless good cause can be shown for the delay. Good cause includes, but is not limited to, non-adoption of the proposed decision, request for reconsideration, remands and other interlocutory orders issued by the Board. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

13. Biological Fluid Testing

Respondent shall immediately submit to biological fluid testing, at respondent's expense, upon request of the Board or its designee. "Biological fluid testing" may include, but is not limited to, urine, blood, breathalyzer, hair follicle testing, or similar drug screening approved by the Board or its designee. Prior to practicing medicine, respondent shall contract with a laboratory or service approved in advance by the Board or its designee that will conduct random, unannounced, observed, biological fluid testing. The contract shall require results of the tests to be transmitted by the laboratory or service directly to the Board or its designee within four hours of the results becoming available. Respondent shall maintain this laboratory or service contract during the period of probation.

A certified copy of any laboratory test result may be received in evidence in any proceedings between the Board and respondent.

If respondent fails to cooperate in a random biological fluid testing program within the specified time frame, respondent shall receive a notification from the Board or its designee to immediately cease the practice of medicine. The respondent shall not resume the practice of medicine until the final decision on an accusation and/or a petition to revoke probation is effective. An accusation and/or petition to revoke probation shall be filed by the Board within 30 days of the notification to cease practice. If the respondent requests a hearing on the accusation and/or petition to revoke probation, the Board shall provide the respondent with a hearing within 30 days of the request, unless the respondent stipulates to a later hearing. If the case is heard by an Administrative Law Judge alone, he or she shall forward a Proposed Decision to the Board within 15 days of submission of the matter. Within 15 days of receipt by the Board of the Administrative Law Judge's proposed decision, the Board shall issue its Decision, unless good cause can be shown for the delay. If the case is heard by the Board, the Board shall issue its decision within 15 days of submission of the case, unless good cause can be shown for the delay. Good cause includes, but is not limited to, non-adoption of the proposed decision, request for reconsideration, remands and other interlocutory orders issued by the Board. The cessation of practice shall not apply to the reduction of the probationary time period.

If the Board does not file an accusation or petition to revoke probation within 30 days of the issuance of the notification to cease practice or does not provide respondent with a hearing within 30 days of a such a request, the notification of cease practice shall be dissolved.

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14. Solo Practice Prohibition

Respondent is prohibited from engaging in the solo practice of medicine. Prohibited solo practice includes, but is not limited to, a practice where: 1) respondent merely shares office space with another physician but is not affiliated for purposes of providing patient care, or 2) respondent is the sole physician practitioner at that location.

If respondent fails to establish a practice with another physician or secure employment in an appropriate practice setting within 60 calendar days of the effective date of this Decision, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The respondent shall not resume practice until an appropriate practice setting is established.

If, during the course of the probation, the respondent's practice setting changes and the respondent is no longer practicing in a setting in compliance with this Decision, the respondent shall notify the Board or its designee within 5 calendar days of the practice setting change. If respondent fails to establish a practice with another physician or secure employment in an appropriate practice setting within 60 calendar days of the practice setting change, respondent shall receive a notification from the Board or its designee to cease the practice of medicine within three (3) calendar days after being so notified. The respondent shall not resume practice until an appropriate practice setting is established.

DATED: March 4, 2019

DocuSigned by:
Carla L. Garrett
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CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

1 XAVIER BECERRA
Attorney General of California
2 JUDITH T. ALVARADO
Supervising Deputy Attorney General
3 NICHOLAS B.C. SCHULTZ
Deputy Attorney General
4 State Bar No. 302151
California Department of Justice
5 300 South Spring Street, Suite 1702
Los Angeles, California 90013
6 Telephone: (213) 269-6474
Facsimile: (213) 897-9395
7 *Attorneys for Complainant*

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO August 23 20 18
BY K. Voong ANALYST

8
9 BEFORE THE
10 MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
11 STATE OF CALIFORNIA

12 In the Matter of the Accusation Against:

Case No. 800-2016-021131

13 DONNA ELAINE WININGHAM, M.D.
545 Elizabeth Court
14 Templeton, California 93465

ACCUSATION

15 Physician's and Surgeon's Certificate
No. C 40332,

16 Respondent.
17

18
19 Complainant alleges:

20 PARTIES

21 1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official
22 capacity as the Executive Director of the Medical Board of California, Department of Consumer
23 Affairs (Board).

24 2. On or about April 19, 1982, the Board issued Physician's and Surgeon's Certificate
25 Number C 40332 to Donna Elaine Winingham, M.D. (Respondent). That license was in full force
26 and effect at all times relevant to the charges brought herein and will expire on March 31, 2020,
27 unless renewed.

28 ///

JURISDICTION

3. This Accusation is brought before the Board under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2001.1 of the Code states:

“Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”

5. Section 2227 of the Code states:

“(a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the board, may, in accordance with the provisions of this chapter:

“(1) Have his or her license revoked upon order of the board.

“(2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.

“(3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.

“(4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.

“(5) Have any other action taken in relation to discipline as part of an order of probation, as the board or an administrative law judge may deem proper.

“(b) Any matter heard pursuant to subdivision (a), except for warning letters, medical review or advisory conferences, professional competency examinations, continuing education activities, and cost reimbursement associated therewith that are agreed to with the board and successfully completed by the licensee, or other matters made confidential or privileged by existing law, is deemed public, and shall be made available to the public by the board pursuant to Section 803.1.”

1 6. Section 2234 of the Code states:

2 “The board shall take action against any licensee who is charged with unprofessional
3 conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not
4 limited to, the following:

5 “(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the
6 violation of, or conspiring to violate any provision of this chapter.

7 “...”

8 7. Section 2236 of the Code states:

9 “(a) The conviction of any offense substantially related to the qualifications, functions, or
10 duties of a physician and surgeon constitutes unprofessional conduct within the meaning of this
11 chapter [Chapter 5, the Medical Practice Act]. The record of conviction shall be conclusive
12 evidence only of the fact that the conviction occurred.

13 “(b) The district attorney, city attorney, or other prosecuting agency shall notify the
14 Division of Medical Quality¹ of the pendency of an action against a licensee charging a felony or
15 misdemeanor immediately upon obtaining information that the defendant is a licensee. The
16 notice shall identify the licensee and describe the crimes charged and the facts alleged. The
17 prosecuting agency shall also notify the clerk of the court in which the action is pending that the
18 defendant is a licensee, and the clerk shall record prominently in the file that the defendant holds
19 a license as a physician and surgeon.

20 “(c) The clerk of the court in which a licensee is convicted of a crime shall, within 48 hours
21 after the conviction, transmit a certified copy of the record of conviction to the board. The
22 division may inquire into the circumstances surrounding the commission of a crime in order to fix
23 the degree of discipline or to determine if the conviction is of an offense substantially related to
24 the qualifications, functions, or duties of a physician and surgeon.

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26 ¹ California Business and Professions Code Section 2002, as amended and effective January 1,
27 2008, provides that, unless otherwise expressly provided, the term “board” as used in the State Medical
28 Practice Act (Cal. Bus. & Prof. Code §§§§ 2000, et seq.) means the “Medical Board of California” and
 references to the “Division of Medical Quality” and “Division of Licensing” in the Act or any other
 provision of law shall be deemed to refer to the Board.

1 “(d) A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to
2 be a conviction within the meaning of this section and Section 2236.1. The record of conviction
3 shall be conclusive evidence of the fact that the conviction occurred.”

4 8. Section 2239 of the Code states:

5 “(a) The use or prescribing for or administering to himself or herself, of any controlled
6 substance; or the use of any of the dangerous drugs specified in Section 4022, or of alcoholic
7 beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to
8 any other person or to the public, or to the extent that such use impairs the ability of the licensee
9 to practice medicine safely or more than one misdemeanor or any felony involving the use,
10 consumption, or self-administration of any of the substances referred to in this section, or any
11 combination thereof, constitutes unprofessional conduct. The record of the conviction is
12 conclusive evidence of such unprofessional conduct.

13 “(b) A plea or verdict of guilty or a conviction following a plea of nolo contendere is
14 deemed to be a conviction within the meaning of this section. The Medical Board may order
15 discipline of the licensee in accordance with Section 2227 or the Medical Board may order the
16 denial of the license when the time for appeal has elapsed or the judgment of conviction has been
17 affirmed on appeal or when an order granting probation is made suspending imposition of
18 sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal
19 Code allowing such person to withdraw his or her plea of guilty and to enter a plea of not guilty,
20 or setting aside the verdict of guilty, or dismissing the accusation, complaint, information, or
21 indictment.”²

22 9. Section 490 of the Code states:

23 “(a) In addition to any other action that a board is permitted to take against a licensee, a
24 board may suspend or revoke a license on the ground that the licensee has been convicted of a

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26
27 ² There is a nexus between a physician's use of alcoholic beverages and his or her fitness to
28 practice medicine, established by the Legislature in Section 2239, in “all cases where a licensed physician
used alcoholic beverages to the extent or in such a manner as to pose a danger to himself or others.”
(*Watson v. Superior Court (Medical Board)* (2009) 176 Cal.App.4th 1407, 1411.)

1 crime, if the crime is substantially related to the qualifications, functions, or duties of the business
2 or profession for which the license was issued.

3 “(b) Notwithstanding any other provision of law, a board may exercise any authority to
4 discipline a licensee for conviction of a crime that is independent of the authority granted under
5 subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties
6 of the business or profession for which the licensee's license was issued.

7 “(c) A conviction within the meaning of this section means a plea or verdict of guilty or a
8 conviction following a plea of nolo contendere. Any action that a board is permitted to take
9 following the establishment of a conviction may be taken when the time for appeal has elapsed, or
10 the judgment of conviction has been affirmed on appeal, or when an order granting probation is
11 made suspending the imposition of sentence, irrespective of a subsequent order under the
12 provisions of Section 1203.4 of the Penal Code.

13 “(d) The Legislature hereby finds and declares that the application of this section has been
14 made unclear by the holding in *Petropoulos v. Department of Real Estate* (2006) 142 Cal.App.4th
15 554, and that the holding in that case has placed a significant number of statutes and regulations
16 in question, resulting in potential harm to the consumers of California from licensees who have
17 been convicted of crimes. Therefore, the Legislature finds and declares that this section
18 establishes an independent basis for a board to impose discipline upon a licensee, and that the
19 amendments to this section made by Chapter 33 of the Statutes of 2008 do not constitute a change
20 to, but rather are declaratory of, existing law.”

21 10. Section 493 of the Code states:

22 “Notwithstanding any other provision of law, in a proceeding conducted by a board within
23 the department pursuant to law to deny an application for a license or to suspend or revoke a
24 license or otherwise take disciplinary action against a person who holds a license, upon the
25 ground that the applicant or the licensee has been convicted of a crime substantially related to the
26 qualifications, functions, and duties of the licensee in question, the record of conviction of the
27 crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact,
28 and the board may inquire into the circumstances surrounding the commission of the crime in

1 order to fix the degree of discipline or to determine if the conviction is substantially related to the
2 qualifications, functions, and duties of the licensee in question.

3 "..."

4 11. California Code of Regulations, title 16, Section 1360 states:

5 "For the purposes of denial, suspension or revocation of a license, certificate or permit
6 pursuant to Division 1.5 (commencing with Section 475) of the code, a crime or act shall be
7 considered to be substantially related to the qualifications, functions or duties of a person holding
8 a license, certificate or permit under the Medical Practice Act if to a substantial degree it
9 evidences present or potential unfitness of a person holding a license, certificate or permit to
10 perform the functions authorized by the license, certificate or permit in a manner consistent with
11 the public health, safety or welfare. Such crimes or acts shall include but not be limited to the
12 following: Violating or attempting to violate, directly or indirectly, or assisting in or abetting the
13 violation of, or conspiring to violate any provision of the Medical Practice Act."

14 **FACTUAL SUMMARY**

15 12. On May 12, 2016, in the case entitled the *People of the State of California v. Donna*
16 *Elaine Winingham*, case number 16M-03655, in the Superior Court of California, County of San
17 Luis Obispo, Respondent, upon her plea of no contest, was convicted of driving a vehicle while
18 having a blood alcohol content of approximately 0.20 percent, in violation of Vehicle Code
19 Section 23152, subdivision (b), a misdemeanor.³ The remaining criminal charge was dismissed
20 as part of Respondent's plea agreement with the San Luis Obispo County District Attorney's
21 Office. Respondent was placed on three years of court-supervised probation with the following
22 terms and conditions:

23 A. Serve five days in the San Luis Obispo County Jail with credit for one day
24 already served in custody;

25 B. Complete the nine-month driving under the influence program for first-time
26 offenders within the period of probation;

27 _____
28 ³ Vehicle Code Section 23152, subdivision (b) provides: "It is unlawful for a person who has 0.08
percent or more, by weight, of alcohol in his or her blood to drive a vehicle..."

- C. Not drive a vehicle with any measurable amount of alcohol in her blood;
- D. Not drive a vehicle unless licensed and insured;
- E. Submit to chemical testing on demand of any peace or probation officer;
- F. Pay fines and fees totaling approximately \$2,425.00; and
- G. Obey all laws.

13. The circumstances leading to Respondent's May 2016 conviction are as follows:

A. At approximately 9:43 p.m. on March 5, 2016, law enforcement officers with the California Highway Patrol (CHP) were dispatched to Templeton High School for the report of an intoxicated driver. The complainant had reported that Respondent was attempting to pick her children up from the high school and was driving while intoxicated. The involved vehicle was described as a gold 2004 Chevrolet Silverado truck. The CHP officers arrived at the high school and observed Respondent leaving the parking lot in the Chevrolet Silverado. The CHP officers proceed to conduct a traffic stop on Main Street in Templeton, California.

B. The CHP officers contacted Respondent who was the sole occupant and driver of the Chevrolet Silverado. As the CHP officers approached the vehicle they quickly observed that Respondent had all four of the vehicle's windows rolled down despite the fact that there was heavy rain. Respondent displayed symptoms of intoxication upon contact including: an odor of alcohol; red, watery, and bloodshot eyes; slurred speech; poor balance; and difficulty following instructions. Standardized Field Sobriety Tests were conducted and Respondent displayed pronounced psycho-physical impairment before she terminated the testing by requesting a "breathalyzer test." During this contact with the CHP officers, Respondent began sobbing and was largely unable to explain the circumstances of her driving under the influence.

C. Respondent consented to and provided two breath samples on the Preliminary Alcohol Screening (PAS) device. The first sample taken at 10:19 p.m. revealed that Respondent's breath alcohol concentration was approximately 0.193 percent. The second sample taken at 10:20 p.m. revealed that Respondent's breath alcohol concentration was approximately 0.198 percent. Respondent was immediately placed under arrest for driving under the influence.

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1 D. Respondent was transported to Twin Cities Hospital for a chemical test of her
2 blood. A blood sample was collected from Respondent's arm revealing that her blood alcohol
3 level was approximately 0.20 percent. Respondent was transported and booked at the San Luis
4 Obispo County Jail.

5 14. On September 15, 2016, Respondent voluntarily participated in an interview
6 conducted by an investigator with the Medical Board of California's Complaint Investigation
7 Office in San Luis Obispo, California. During this interview, Respondent stated that she
8 regularly consumes "a couple of glasses of wine maybe three or four times a week or less." With
9 regards to her arrest for driving under the influence on March 5, 2016, Respondent admitted to
10 drinking three or four glasses of wine before driving from her home to Templeton High School in
11 order to pick up her daughter.

12 **FIRST CAUSE FOR DISCIPLINE**

13 **(Conviction of a Substantially Related Crime)**

14 15. By reason of the facts set forth in paragraphs 12 through 14 above, Respondent is
15 subject to disciplinary action under Section 2236, subdivision (a), and Section 490 of the Code, as
16 well as California Code of Regulations, title 16, Section 1360, in that Respondent has been
17 convicted of a crime substantially related to the qualifications, function or duties of a physician
18 and surgeon.

19 16. Respondent's acts and/or omissions as set forth in paragraphs 12 through 14 above,
20 whether proven individually, jointly, or in any combination thereof, constitutes the conviction of
21 a crime substantially related to the qualifications, function or duties of a physician and surgeon,
22 pursuant to Section 2236, subdivision (a), and Section 490 of the Code, as well as California
23 Code of Regulations, title 16, Section 1360.

24 **SECOND CAUSE FOR DISCIPLINE**

25 **(Use of Alcoholic Beverages in a Dangerous Manner)**

26 17. By reason of the facts set forth in paragraphs 12 through 14 above, Respondent is
27 subject to disciplinary action under Section 2239 of the Code in that Respondent used alcoholic

28 ///

1 beverages to the extent, or in such a manner, as to be dangerous and injurious to herself or to any
2 other person or to the public.

3 18. Respondent's acts and/or omissions as set forth in paragraphs 12 through 14 above,
4 whether proven individually, jointly, or in any combination thereof, constitutes the use of
5 alcoholic beverages to the extent, or in such a manner, as to be dangerous and injurious to herself,
6 or to any other person or to the public, pursuant to Section 2239 of the Code.

7 **THIRD CAUSE FOR DISCIPLINE**

8 **(Unprofessional Conduct)**

9 19. By reason of the facts set forth in paragraph 12 through 14 above, Respondent is
10 subject to disciplinary action under Section 2234, subdivision (a) of the Code in that Respondent
11 has been convicted of a crime substantially related to the qualifications, functions, or duties of a
12 physician and surgeon, and Respondent has used alcoholic beverages to the extent, or in such a
13 manner, as to be dangerous and injurious to herself, or to any other person or to the public.

14 20. Respondent's acts and/or omissions as set forth in paragraphs 12 through 14 above,
15 whether proven individually, jointly, or in any combination thereof, constitutes the conviction of
16 a crime substantially related to the qualifications, functions, or duties of a physician and surgeon,
17 and the use of alcoholic beverages to the extent, or in such a manner, as to be dangerous and
18 injurious to herself, or to any other person or to the public, pursuant to Section 2234, subdivision
19 (a) of the Code.

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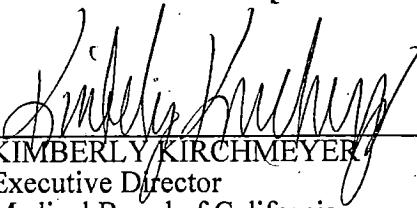
PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing the Medical Board of California issue a decision:

1. Revoking or suspending Physician's and Surgeon's Certificate Number C 40332 issued to Donna Elaine Winingham, M.D.;
2. Revoking, suspending or denying approval of her authority to supervise physician assistants pursuant to Section 3527 of the Code, and advanced practice nurses;
3. If placed on probation, ordering Donna Elaine Winingham, M.D. to pay the Board the costs of probation monitoring; and
4. Taking such other and further action as deemed necessary and proper.

DATED:

August 23, 2018


KIMBERLY KIRCHMEYER
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant

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